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COMMENTS AND OBSERVATIONS OF GOVERNMENTS ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND ADOPTED ON FIRST READING BY THE INTERNATIONAL LAW COMMISSION AT ITS FORTY-THIRD SESSION

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POLAND

[Original: English]

[29 March 1993]

Question of penalties

In the field of public international law it is very difficult to establish a uniform system of punishment which would be acceptable for all States. There are many concepts and philosophies regarding the punishment system provided in the domestic law of States. Certain penalties in force in some countries and based on a long-term legal and cultural tradition are unknown in others, for example death and physical mutilation penalties.

The first important question as concerns penalties is whether a penalty should be indicated and specified for each crime against the peace and security of mankind separately or whether, since all such crimes were marked by the same degree of extreme gravity and seriousness, a general formula should be adopted for all cases - the same penalty for all crimes with a minimum and maximum according to whether or not there are extenuating or aggravating circumstances. Practically, the second option (i.e., penalty applicable to all crimes) would have more chances to be adopted by all States. Determining a separate penalty for each crime would require very careful discussion on part II of the draft Code and probably would not prevent the achievement of a satisfactory compromise in the near future.

Taking into account a diversity of legal systems, philosophies and traditions of criminal law of many countries, the Government of Poland supports the second option: the imprisonment (life imprisonment and imprisonment for a term of 10 to 35 years) term to be strictly determined by the court, according to the circumstances of the case, and, if deemed necessary by the court, supplemented by community work, total or partial confiscation of property and deprivation of some or all civil and political rights (as has been proposed by Special Rapporteur in the new, second version of draft article Z).

Therefore, the Polish Government is in favour of a single penalty with a minimum and a maximum. On the other hand, it is obvious that some crimes might be considered as more serious than others - for example genocide or aggression - and could not be considered and treated in the same way as drug trafficking, but such differences should be taken into account by the court in the decision-making process between life imprisonment and imprisonment for a term of 10 years (minimum).

The second question regarding penalties is the question about the type of applicable penalties and what penalties under the Code should be applied.

Regarding life imprisonment, Poland shares the opinion that persons who have committed "most serious of the most serious crimes" should be separated and removed from the international and domestic community for ever in order to protect mankind and prevent the renewal of such crimes in the future.

As concerns temporary imprisonment (for the term of 10 to 35 years) the Polish Government is of the view that the individual who has been convicted for temporary imprisonment should serve his full sentence without the right to apply for earlier release.

Poland draws attention to the fact that the draft Code does not determine what subject or body would carry out the imprisonment penalty and, consequently, in which State the condemned persons should serve their sentences. This determination would be important since the rigours of the penal institutions and prisons differ in various countries and it is necessary to take these differences into account.

In the opinion of the Government of Poland, the main problem regarding supplementary (additional) penalties seems to be their "territorial localization" in one or another country. The question arises with respect to in which State the penalty of deprivation of some or all civil and political rights would be effective and applicable. Furthermore, this particular penalty should be decided only by the domestic court of the State whose national is the prosecuted person.

The community work, as a supplementary penalty, also provokes some doubts. First, this penalty ought to be decided only in the cases of less serious petty offences or misdemeanours, but not crimes. Secondly, these doubts concern the question for whom such work would be done and what society or State would be the beneficiary of it.

In principle, Poland is of the view that the restoration of stolen property is a subject of the domestic law and jurisdiction of each concerned country. Furthermore, there are many well-known problems and difficulties concerning the revindication of property, even in domestic cases.

The total or partial confiscation of property as one of the optional penalties would be useful in many cases. As to whom the confiscated property would be awarded to on the international level, the Polish Government supports the view that, according to the well-recognized principle of law, the stolen part of such property should be restored to its rightful owner or his heirs.

Turning over the remaining (un-stolen) part of the confiscated property to the humanitarian organizations or allocating it to the special United Nations fund might provoke certain practical problems, particularly with regard to the real estate.

The institution of criminal proceedings (submission of cases to the court).

Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted first of all, but not only, by States. In the view of the Polish Government, in some cases it would be more convenient and suitable for other entities concerned (such as international governmental and non-governmental organizations) to initiate criminal procedures rather than for States, as for example in environmental crimes, human rights violations or war crimes. Therefore such organizations as are concerned should have the right to take action as regards the crimes described in the draft Code.

Poland does not share the opinion that the right to bring charges should be entrusted to a special prosecutor's office attached to the court, because it would be difficult to establish one more international criminal body responsible for investigating and determining the grounds for prosecution.

The crimes of aggression and the threat of aggression as provided in the draft Code constitute also violations of international peace and security. Therefore, in these cases, the position and rights of the Security Council must be underlined and taken into account. The Security Council itself should not be competent to take any judicial measures and to institute criminal proceedings directly; the opposite solution would not be logical and suitable. Furthermore, it would require amending the Charter of the United Nations. The court should be bound by a decision of the Security Council determining that there was an act of aggression or threat of aggression, but if the Security Council did not act and make such a determination, the court would have full capacity to determine the given act as one of aggression or threat of aggression by its own decision. Later, the Security Council, in its activities, would not be bound by such a decision of the court.

This would make it possible to avoid the possibility of blocking criminal proceedings were the Security Council unable to take a positive decision in the matter.

In conclusion, each positive decision of the Council would be binding for the court, otherwise, the court, acting on the legal - not the political - level, would have to make its own decision and continue criminal proceedings regardless of the "no-decision" results of the Security Council action. As mentioned by some members of the International Law Commission (ILC) during the consideration of the topic at its forty-third session, the International Court of Justice in its judgment of 27 June 1986 (Nicaragua versus United States of America 1/), paragraphs 187-201 and 227-238, had not refused to consider the question whether one of the States parties to the dispute had been guilty of an act of aggression which had not been determined by the Security Council. In the case, the Court decided (quoting the definition of aggression annexed to General Assembly resolution 3314 (XXIX) of 14 December 1974 as expressing customary law in this respect) by 12 votes to 3, that the United States, by certain attacks on Nicaraguan territory and other acts which involved the use of force, had acted against Nicaragua in breach of its obligations under international law not to use force against another State.

Question whether all of the crimes under the Code or only a number of them could involve attempts - and in the latter case - which (article 3, para. 3, of the draft)

The Government of Poland is of the view that the automatic transfer of the forms of offence from the domestic to the international level is not appropriate. There are even doubts in respect of attempt. Those doubts are much more serious with regard to the other forms of offence, such as preparation for it, aiding and abetting and incitement to the crime. Nevertheless, the Government of Poland is open to consider the attempt as a useful and applicable

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1/ Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States of America), I.C.J. Reports 1986, p. 14.

concept in the following types of crimes described by the draft Code in articles 15, 17, 19, 21, 22, 24, 25 and 26.

The Government of Poland considers that the crime of the threat of aggression, in its essential nature, seems to be something like "pre-attempt of aggression", and it would be going too far to recognize as a crime an "attempt of the threat", whatever the threat could be.

In the crimes described in articles 18, 20 and 23 of the draft Code, the most essential element seems to be a wrongful result of the concrete act and therefore, in the cases of absence of such result (for example, in the case when only the attempt of a crime has been committed), one should carefully consider and review such act in a different manner, maybe outside the terms of criminal responsibility.

Regarding part II of the draft Code as a whole, the Government of Poland is of the opinion that the order in which particular crimes have appeared in it does not mean the establishment of the scale or degree of seriousness of those crimes and the hierarchy of gravity among them. The Government of Poland supports the fact that the draft does not maintain a distinction between crimes against peace, war crimes and crimes against humanity.

Comments on particular articles

Article 1

Bracketing words ("under international law") does not seem necessary in this context. The Code will be a treaty and may constitute crimes only as international law crimes in terms of international law. On the other hand, many internal systems of law recognize crimes described in the Code and they are also crimes of domestic law. Therefore, if the bracketed words were omitted it would leave open the question of "double recognition" of such crimes as crimes of international and domestic law as well.

Article 2

The Polish Government suggests substituting the words "is not punishable" by the words "is not a crime" or "is not unlawful".

Article 3

The Government of Poland supports the idea that the draft Code limits criminal responsibility for crimes described in it to the individuals only.

There are three categories of individuals who might be responsible and liable to punishment under the provisions of the Code:

(1) Leaders and organizers of crimes (arts. 15, 16, 17, 18, 20);

(2) Agents or representatives of States (arts. 23 and 24);

(3) Each person (individual) (arts. 19, 21, 22, 25, 26).

The last category is the most general.

Concerning these categories, the Government of Poland is of the view that the adoption for the purposes of articles 23 and 24 of such personal limitation of responsibility (second category as mentioned above) goes too far. When the individual is not an agent or representative of the State, the definitions of crimes as described in articles 23 and 24 are not fulfilled. Therefore the question arises why only qualified categories of individuals should be responsible for crimes against the peace and security of mankind while the wrongful results and gravity of such acts performed by other persons not being agents (representatives of States) are the same.

Article 5 is a well-balanced barrier against the possible interpretation of the provisions of the draft Code as relieving States of their own responsibility under international law for all wrongful activities attributable to them. Prosecution, conviction and punishment of individuals under the provisions of the Code for the crimes described in it does not constitute any kind of substitute for the State's responsibility.

The essence of the State's responsibility for acts is of a different nature and exists on a different level.

Article 6 establishes the right priority of jurisdiction recognizing the special position of the State in whose territory the crime was committed. It is important that paragraphs 1 and 2 of article 6 do not prejudge the jurisdiction of the future international criminal court.

Article 7

The provision providing that no statutory limitation shall apply to crimes against the peace and security of mankind is direct evidence that these crimes are primarily crimes of international law, determined and constituted by this law.

Article 8

Some doubts arise regarding the expression "minimum guarantees due to all human beings with regard to the law and the facts". The Government of Poland is of the view that rather the maximum or the widest guarantees should be recognized instead of the "minimum". Furthermore, it is not clear what the words "guarantees with regard to the facts" mean and how they should be interpreted.

As concerns the expression "by law or by treaty", the Government of Poland considers that making a distinction between law and treaty suggests that a treaty is not a law or has some other than legal nature. The Polish Government proposes to omit the words "or by treaty" and simply leave "by law".

Article 9

The "non bis in idem" principle, as mentioned in the title of this article, has been elaborated in such a manner in the text that it has practically lost

its fundamental sense and significance. That is why Poland considers that further work regarding this article should be continued intensively.

As concerns article 10, the Government of Poland shares the way of formulation of the non-retroactivity principle contained in it. Those crimes which existed before the entry into force of the Code might be prosecuted and punished accordingly.

Article 11 reflects experience coming mainly from the Nürnberg trial. Generally speaking, any kind of order does not exclude a responsibility (that is, a principle) excepting such a situation as when, in the circumstances at the time, it was possible for a subordinate not to comply with the order. Practically, it may be expected that at the international criminal court many perpetrators of crimes will refer to this exception as an excellent line of defence.

The Polish Government is of the view that in such cases it would be difficult for the court to make a proper and objective interpretation of the expression "in the circumstances at the time, it was possible for him not to comply with that order". It is not clear what this sentence really means. There are many possibilities of its interpretation: does it only mean a threat to the personal safety of the subordinate, or does it also concern the safety of the members of his/her family and other close relatives? Poland is of the view that it would require further specification. In the opinion of the Polish Government, article 11 is one of the key provisions as regards the determination of the responsibility in many particular cases.

The provisions of article 13 do not recognize any kind of immunity with respect to the position or office of an individual who commits a crime, including persons that are heads of State or Government. It is a serious but logical and reasonable limitation of the full immunity of heads of State. Such immunity cannot be a measure which would allow them to be over and outside criminal responsibility for crimes against the peace and security of mankind.

Article 14

As concerns paragraph 1, the Government of Poland would like to underline that in its opinion this paragraph includes traditional criminal law defences such as self-defence, coercion, state of necessity, vis maior and error - all related to the existence or non-existence of responsibility. Extenuating and maybe other kinds of circumstances, which might be taken into account by the Commission in the second reading, determine only the increasing or the lowering of the penalty.

Paragraph 2, in the opinion of the Polish Government, should be supplemented by adding "aggravating circumstances" and also "other circumstances such as, for example, the personality of the offender, the gravity of the effects of the crime and others, as the case may be".

Subparagraph (h) of paragraph 4 of article 15 is an important supplementing clause which allows the Security Council to take into account the future progress of international law concerning the definition of aggression, and

particularly the possible new forms of aggression which might appear in the future.

Article 21

As is determined in the title of this article, only their systematic or mass character qualifies violations of human rights as a crime against the peace and security of mankind. Such a determination clearly excludes individual and occasional violations of human rights from the definition of that crime. But there is, in the opinion of the Polish Government, some kind of inconsistency in the construction of article 21. However, the title of this article provides that the "systematic or mass character" must be a necessary attribute of the crime described in it; this attribute appears consequently only once in the detailed enumeration of the five forms (examples) of the crime. Therefore, it is not clear whether murder(s) or torture(s) should also have "systematic or mass" character to be recognized as a crime under article 21 or not. It is not so clear whether the essential provisions of this article should be read in conjunction with its title or not. If only an act of systematic or mass violations constitutes a crime under the provisions of this article and otherwise does not come under the draft Code, this must be expressed clearly not only in the title but particularly in the text of the article.

Article 25

The expression "on a large scale" has a subjective character, and without any instructions, even general ones, as to what it means it would be difficult for the court to answer the question which scale is large and which one is not.

Article 26

It would be reasonable to supplement the expression "long-term" by adding the word "effects" at the end ("long-term effects") because, as has been mentioned by the Commission, the expression "long-term" does not mean the period of time in which the damage occurs, but the long-term nature of its effects.

The observations made above in relation to the term of article 25 ("on a large scale") apply in the same manner to the expressions "widespread and severe", which determine the character of damage to the environment in article 26.

Article 26 conflicts with article 22 on war crimes which also deals with protection of the environment (para. 2 (d)). Under the provisions of this article it is also a crime when an individual employs such methods or means of warfare that might be expected to cause damage, even if the purpose of using such methods has not been to cause damage in the environment, whereas article 26 is based on the concept of intention and will ("who wilfully causes").